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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 93-107
Channel 280A
Westerville, Ohio

Dear Mr. Caton:

Enclosed for filing on behalf of Ohio Radio Associates, Inc. are an original and eleven (11) copies of its "Reply to Opposition of WII."

Please contact the undersigned in our Washington, D.C. office.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:


Stephen T. Yelverton

Enclosure

B:CATON.146

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of:

DAVID A. RINGER

et al.,

Applications for Construction
Permit for a New FM Station,
Channel 280A, Westerville,
Ohio

To: The Review Board

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)
) MM Docket No. 93-107

)
) File Nos. BPH-911230MA

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) through

)
) BPH-911231MA

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JUN 23 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

REPLY TO OPPOSITION OF WII

Respectfully submitted,

MCNAIR & SANFORD, P.A.

By: _____

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June 23, 1994

B:CATON.146

REPLY TO OPPOSITION OF WII

Ohio Radio Associates, Inc. ("ORA"), by its attorneys, pursuant to Section 1.294 (c)(3) of the Commission's Rules, hereby submits this reply to opposition. On June 6, 1994, ORA filed a motion to dismiss the application of Wilburn Industries, Inc. ("WII"). Dismissal was requested because WII lost "reasonable assurance" of its initially proposed tower site and failed to diligently amend its application with the required engineering data for the new proposed tower site. On June 14, 1994, WII filed an opposition thereto. In reply to the opposition, ORA submits the following comments.

As noted in the motion to dismiss, WII filed an amendment on April 13, 1994, and reported that its proposed tower site had been sold by Mid-Ohio Communications, Inc. to Spirit Communications, Inc. Although WII never disclosed when the site was sold, it was given written confirmation of the sale by Mid-Ohio on March 2, 1994.

WII represented in its April 13, 1994, pleading that it had obtained "reasonable assurance" of a new tower site and would be filing an amendment with the required engineering data. WII so far has failed to file such an amendment. David A. Ringer, another applicant in this proceeding who also had initially specified the now unavailable Mid-Ohio tower site, filed an amendment on May 9, 1994, specifying a new tower site, along with the required engineering data.

ORA contended in its motion to dismiss that the application of WII must be dismissed with prejudice for failure to prosecute. It has not been diligent in amending its application.

In opposition to the motion to dismiss, WII claims that it will amend its application sometime in the future to supply the required engineering data. According to WII, Commission policy gives it up to two years to file such an amendment.

However, WII misunderstands Commission policy in this respect. Due diligence depends on the unique facts and circumstances of each case. Shablom Broadcasting, Inc., 93 FCC2d 1027, 1030 (Rev. Bd. 1983). See also, CHM Broadcasting Limited Partnership v. FCC, Case No. 92-1263, p. 12, decided June 13, 1994, due diligence is an essential element of "good cause" to amend and such

due diligence is measured from the date an applicant is put on notice or challenged as to an application deficiency. There, the Court held that an applicant was required to amend its application, at least, by the time it responded to a motion to enlarge the issues raising an application deficiency.

In this case, due diligence must be measured against Ringer's filing of a tower site amendment, along with the required engineering data, on May 9, 1994, and ORA's June 6, 1994, motion to dismiss challenging WII's lack of due diligence in this respect. WII and Ringer are identically situated. Therefore, WII must explain and justify why it could not also have filed an amendment specifying a new tower site, along with the required engineering data, by May 9, 1994, or at the very least, by the time of it filing a response on June 14, 1994, to ORA's motion to dismiss.

WII's promise, in its June 14, 1994, opposition, to file an engineering amendment sometime in the future, must be evaluated in the context of its earlier promise to file such an amendment. In its April 13, 1994, pleading, WII made such a vague promise, but never fulfilled it. Simply put, WII can not be relied upon to make good on its promises.

The failure of WII to file the required engineering data is consistent with its modus operandi in this proceeding. When initially filing its application, WII declined to pay the fees for a consulting engineer to prepare the engineering section. Rather, WII plagiarized engineering data on file at the Commission.

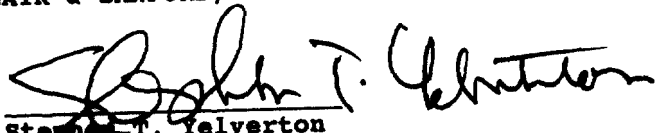
In conclusion, Commission precedent requires the dismissal of WII's application because of a failure to amend its application to supply the required engineering data. Royce International Broadcasting Co. v. FCC, 820 F.2d 1332, 1332 (D.C. Cir. 1987).

WHEREFORE, in view of the foregoing, WII must be dismissed with prejudice forthwith because it has failed to diligently prosecute its application by not submitting the required engineering data for its new tower site.

Respectfully submitted,

McNAIR & SANFORD, P.A.

By:


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June 23, 1994

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CERTIFICATE OF SERVICE

I, Stephen T. Yelverton, an attorney in the law firm of McNair & Sanford, P.A., do hereby certify that on this 23rd day of June, 1994, I have caused to be hand delivered or mailed, U.S. mail, postage prepaid, a copy of the foregoing "Reply to Opposition of WII" to the following:

Joseph A. Marino, Chairman*
Review Board
Federal Communications Commission
Room 211
2000 L Street, N.W.
Washington, D.C. 20554

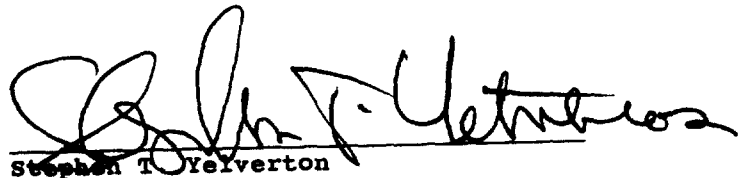
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